Lee Phet Boon v Hock Thai Finance Corp Bhd & Anor

HIGH COURT (MIRI) — ORIGINATING MOTION NO MR 9 OF 1993
HASAN JC
27 APRIL 1999

Auctions and Auctioneers *— Sale of land — Reduction in reserved price — Reserved price not approximately equal to estimated fair market value of land as stated in valuation report — Whether reserved price ultra vires — Directions for sale consequential to order for sale and made in separate application, whether valid — Whether senior assistant registrar has power to make such order for sale — Sarawak Land Code (Cap 81) ss 150(1) & 152 — Rules of the High Court 1980 O 32 r 9 & O 31 r 2(4)*

On 14 March 1988, the court ordered that the plaintiff's land which was the subject matter of a charge be sold by public auction. The directions for the sale was given by the senior assistant registrar ('the SAR') in the court order dated 9 September 1988 with the reserved price at RM150,000. However, the public auction held at the said reserved price was unsuccessful as there was no bidder. The defendant then applied for an order that the land be again put up for auction at a reduced price of RM135,000 based on a valuation report put up by a private valuer dated 19 June 1991. On 9 March 1992, the court allowed the application and ordered that the land be put up for sale with a reduced reserved price of RM135,000 subject to s 151 of the Sarawak Land Code (Cap 81) ('the Code') and also subject to the directions of the court. On a summons for directions, the SAR, on 4 March 1993 made the order that the auction sale be held on 12 June 1993 with the reserved price of RM135,000 and that the proceeds of sale be paid into court and be dealt with in the manner provided in s 151 of the Code. The said two orders were made in the absence of the plaintiff who was duly served with the notice of the proceedings. The second auction was duly carried out. The land was then transferred to the successful bidder. The plaintiff made an application for an order that the two orders be jointly and severally discharged or set aside. In the alternative, the plaintiff prayed for a declaration that the two orders were ultra vires and null and void. The plaintiff submitted that the two impugned orders were not made in accordance with the law in that they failed and/or neglected to comply with the provisions of the terms and conditions stated in ss 150(1) and 152 of the Code. Further, the reserved price of RM135,000 was ultra vires as it was not approximately equal to the estimated fair market value of RM169,000 as stated in the valuation report dated 24 June 1993. In relation to this, the plaintiff also submitted that the judge ought to have given reasons for the reduction in the reserved price. The defendant contended that the procedure in s 150(1) of the Code was not applicable or relevant because the two said orders were not made under that section but they were made under s 152 of the Code. In respect of the order made by the SAR, the defendant submitted that

the SAR had the power and the jurisdiction by virtue of O 32 r 9 and O 31 r 2(4) of the Rules of the High Court 1980 ('the RHC'). A

Held, dismissing the application:

(1) The order for sale made under s 150(1) of the Code may be made without incorporating the directions for the conduct of sale at the same time. In other words, the directions for conduct of sale are not pre-requisites but merely consequential to the making of the order for sale and, as such, the directions for sale may be made separately in a subsequent order (see pp 510A–B). B

(2) Alternatively, as the order for sale was made pursuant to the application under s 150 of the Code, the said order which provided that the land be put up for auction at the 'reduced price of RM135,000 subject to the directions of the court and s 151 of the Land Code' was valid as it complied with the provisions of s 152 of the Code. Although the requirements under s 150(1) are separate and distinct requirements from the provision of s 152 of the Code, they have also to be complied with before the auction can be carried out. The directions for sale pursuant to s 150(1) of the Code are therefore consequential to the order made under s 152 of the Code and they may be made in a separate application. Furthermore, the order for sale dated 9 March 1992 clearly provided that it was 'subject to the directions of the court' (see p 510B–D). C D E

(3) The SAR had power and jurisdiction to make the order dated 4 March 1993 as the word 'court' under s 150(1) of the Code includes the SAR sitting alone by virtue of O 32 r 9, O 31 r 2(4) and O 1 r 4(2) of the RHC. The word 'registrar' in O 32 r 9 includes 'the senior assistant registrar'. In s 2 of the Courts of Judicature Act 1964, the word 'registrar' has been defined as 'the Chief Registrar and any registrar, deputy registrar, senior assistant registrar or registrar appointed under s 10'. As such, the powers and authorities given to the registrar under the RHC can also be exercised by the senior assistant registrar (see pp 510E–511A). F G

(4) Under O 31 r 2(4) of the RHC, it is provided that on the hearing of the summons, the court may give such directions as it thinks fit for the purpose of effecting the sale and, by virtue of O 1 r 4(2), the word 'Court' includes the registrar. The powers given to the court to give directions for the purpose of effecting the sale is very wide and it is not only confined to the directions as stated in para (a) to (h) of O 31 r 2(4). Hence, the submission made by the plaintiff that the directions to be given under r 2(4) do not include the fixing of the date of sale by auction was untenable (see p 511A–C). H

(5) The judge had relied and accepted the valuation report which stated that the recommended reserved price was RM135,000. The plaintiff did not challenge or oppose the recommended I

reserved price and in fact he chose not to attend the hearing. That was the only evidence available to the judge at that time. As such, the judge was acting within his jurisdiction in fixing the reserved price. Further, the reserved price determined under s 152 of the Code may not be approximately equal to its estimated fair market value unlike the reserved price determined under s 150(1) of the Code. Section 152 permits the court to fix a reduced reserved price. As such, even if the reserved price was not approximately equal to the estimated fair market value of the land, the judge had also acted within the provision of s 152 of the Code (see p 512C–E).

[Bahasa Malaysia summary

Pada 14 Mac 1988, mahkamah telah memerintahkan bahawa tanah plaintif yang digadai dijual secara lelong awam. Arahan-arahan bagi jualan tersebut telah diberi kepada penolong kanan pendaftar ('PKP tersebut') di dalam perintah mahkamah bertarikh 9 September 1988 dengan harga rizab berjumlah RM150,000. Walau bagaimanapun, lelong awam yang ditetapkan pada harga rizab tersebut tidak berjaya kerana tiada yang membuat tawaran. Defendan kemudiannya memohon suatu perintah bagi tanah tersebut dilelong semula pada harga yang lebih rendah berjumlah RM135,000 berdasarkan laporan penilaian yang disediakan oleh penilai persendirian bertarikh 19 Jun 1991. Pada 9 Mac 1992, mahkamah membenarkan permohonan tersebut dan memerintah agar tanah tersebut dijual pada harga rizab yang telah diturunkan berjumlah RM135,000 tertakluk kepada s 151 Kanun Tanah Sarawak ('Kanun tersebut') dan juga tertakluk kepada arahan mahkamah. Dalam suatu saman untuk arahan, PKP tersebut, pada 4 Mac 1993 telah mengarahkan lelong jualan tersebut ditetapkan pada 12 Jun 1993 pada harga rizab berjumlah RM135,000 dan hasil kutipan jualan tersebut dibayar ke mahkamah dan dikendalikan sebagaimana diperuntukkan di dalam s 151 Kanun tersebut. Kedua-dua perintah tersebut telah dibuat semasa ketiadaan plaintif yang telah diserahkan dengan notis prosiding seperti yang sepatutnya. Lelong kedua telah dibuat seperti yang sepatutnya. Tanah tersebut telah dipindahmilikkan kepada penawar yang berjaya. Plaintif telah membuat permohonan agar kedua-dua perintah tersebut dilepaskan secara bersesama dan berasingan atau diketepikan. Secara alternatif, plaintif telah memohon suatu deklarasi mengatakan kedua-dua perintah tersebut adalah ultra vires dan batal dan tak sah. Plaintif menghujahkan bahawa kedua-dua perintah yang dipersoalkan tidak mengikut undang-undang di mana ia gagal dan/atau cuai untuk mengikut peruntukan-peruntukan dalam terma-terma dan syarat-syarat yang dinyatakan di dalam ss 150(1) Kanun tersebut. Selanjutnya, harga rizab berjumlah RM135,000 tersebut adalah ultra vires kerana tidak lebih kurang sama dengan nilai anggaran pasaran yang berpatutan berjumlah RM169,000 sebagaimana yang dinyatakan di dalam laporan penilaian bertarikh 24 Jun 1993. Sehubungan

itu, plaintif juga menghujahkan bahawa hakim patut memberi sebab-sebab penurunan harga rizab tersebut. Defendan menegaskan bahawa prosedur di dalam s 150(1) Kanun tersebut tidak dapat digunakan atau berkaitan kerana kedua-dua perintah tersebut tidak dibuat di bawah seksyen tersebut tetapi dibuat di bawah s 152 Kanun tersebut. Dari segi perintah yang dibuat oleh PKP tersebut, defendan menghujahkan bahawa PKP tersebut mempunyai kuasa dan bidang kuasa berdasarkan A 32 k 9 dan A 31 k 2(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak permohonan tersebut:

(1) Perintah jualan yang dibuat di bawah s 150(1) Kanun tersebut boleh dibuat tanpa mengabungkan arahan-arahan bagi pengendalian jualan tersebut pada masa yang sama. Dalam erti kata lain, arahan-arahan bagi pengendalian jualan tersebut adalah tidak diwajibkan tetapi hanya penting di dalam pembikinan perintah jualan tersebut dan, oleh demikian, arahan-arahan jualan tersebut boleh dibuat secara berasingan bagi perintah berikutnya (lihat ms 510A–B).

(2) Secara alternatif, memandangkan perintah jualan tersebut dibuat selaras dengan permohonan di bawah s 150 Kanun tersebut, maka perintah tersebut yang memperuntukkan supaya tanah tersebut dilelong pada 'harga rizab berjumlah RM135,000 tertakluk kepada arahan-arahan daripada mahkamah dan s 151 Kanun Tanah' adalah sah kerana ia adalah mengikut peruntukan-peruntukan s 152 Kanun tersebut. Walaupun keperluan-keperluan di bawah s 150(1) adalah keperluan-keperluan berasingan dan berbeza daripada peruntukan-peruntukan s 152 Kanun tersebut, ia perlu juga diikuti sebelum lelong tersebut boleh dilaksanakan. Arahan-arahan jualan yang selaras dengan s 150(1) Kanun tersebut, oleh demikian adalah penting kepada perintah yang dibuat di bawah s 152 Kanun tersebut dan boleh dibuat di dalam permohonan yang berasingan. Selanjutnya, perintah jualan bertarikh 9 Mac 1992 dengan jelas memperuntukkan bahawa ia adalah 'tertakluk kepada arahan-arahan mahkamah' (lihat ms 510B–D).

(3) PKP tersebut mempunyai kuasa dan bidang kuasa untuk membuat perintah bertarikh 4 Mac 1993 di mana perkataan 'mahkamah' di bawah s 150(1) Kanun tersebut adalah termasuk PKP tersebut yang boleh bersidang seorang sahaja berdasarkan A 32 k 9, A 31 k 2(4) dan A 1 k 4(2) KMT. Perkataan 'pendaftar' di dalam A 32 k 9 termasuk 'penolong kanan pendaftar'. Di dalam s 2 Akta Kehakiman 1964, perkataan 'pendaftar' telah ditafsirkan sebagai 'Ketua Pendaftar dan mana-mana pendaftar, timbalan pendaftar, penolong kanan pendaftar atau pendaftar yang dilantik di bawah s 10'. Oleh demikian, kuasa-kuasa dan autoriti-autoriti yang diberi kepada pendaftar di bawah KMT boleh juga digunakan oleh penolong kanan pendaftar (lihat ms 510E–511A).

(4) Di bawah A 31 k 2(4) KMT, telah diperuntukkan bahawa pada pembicaraan saman, mahkamah boleh memberi arahan-arahan jika difikirkan perlu bagi tujuan melaksanakan jualan tersebut dan berdasarkan A 1 k 4(2), perkataan 'Mahkamah' termasuk pendaftar. Kuasa-kuasa yang diberi bagi tujuan pelaksanaan jualan tersebut adalah luas dan tidak hanya terbatas kepada arahan-arahan sebagaimana yang dinyatakan di perenggan (a) hingga (h) pada A 31 k 2(4). Justeru itu, penghujahan yang dibuat oleh plaintif bahawa arahan-arahan yang harus diberi di bawah k 2(4) tidak termasuk penetapan tarikh jualan secara lelong tidak dapat dipertahankan (lihat ms 511A–C).

(5) Hakim telah bergantung kepada laporan penilaian yang menyatakan bahawa harga rizab yang dicadangkan adalah berjumlah RM135,000. Plaintif tidak melawan atau membantah cadangan harga rizab tersebut dan malahan telah memilih untuk tidak hadir pada pembicaraan tersebut. Hanya itulah bukti yang ada kepada hakim pada masa tersebut. Oleh demikian, hakim telah bertindak di dalam bidang kuasanya dalam menentukan harga rizab tersebut. Selanjutnya, harga rizab yang ditentukan di bawah s 152 Kanun tersebut mungkin tidak lebih kurang sama dengan nilai anggaran pasaran yang adil berbeza dengan harga rizab yang ditentukan di bawah s 150(1) Kanun tersebut. Seksyen 152 membenarkan mahkamah menetapkan penurunan harga rizab. Oleh itu, walaupun harga rizab tersebut tidak lebih kurang sama dengan nilai anggaran pasaran yang adil bagi tanah tersebut, hakim juga telah bertindak di dalam peruntukan s 152 Kanun tersebut (lihat ms 512C–E).]

Notes

For cases on sale of land in an auction generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1168–1177.

Cases referred to

Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor & other actions [1995] 1 MLJ 92 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Development and Commercial Bank, Johor Bahru v Kim Ming Choon [1991] 2 MLJ 246 (refd)

Hordern Richmond Ltd v Duncan [1947] 1 All ER 427 (refd)

Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd [1990] 1 MLJ 15 (refd)

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (refd)

Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651 (refd)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (refd) A

NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd [1992] 2 MLJ 349 (refd)

Legislation referred to B

Courts of Judicature Act 1964 s 2

National Land Code 1965 s 257(1)(a)–(d)

Rules of the High Court 1980 O 1 r 4(2), O 8 r 3, O 31 r 2(4), O 32 r 9, O 52 r 2(1), O 52 r 2(2), O 56 rr 1(1), 2

Sarawak Land Code (Cap 81) ss 148(2), 150, (1), 151, 152 C

Tai Choi Yu (*Tai Choi Yu & Co*) for the plaintiff.

Kevin KK Kong (*Khoo & Co*) for the defendant.

MS Sandhu (*MS Sandhu & Co*) for the purchaser.

Cur Adv Vult D

Hasan JC: This is an application by the plaintiff by way of a notice of motion dated 24 November 1993 made pursuant to O 8 r 3 of the Rules of the High Court 1980 for an order that the two orders made in chambers by Denis Ong J dated 9 March 1992, and by the senior assistant registrar dated 4 March 1993 in Miri High Court Originating Summons No MR 46 of 1987 be jointly and severally discharged or set aside. In the alternative, the E plaintiff prays for a declaration that the two orders are ultra vires and null and void. The grounds given for the application are that the orders:

(i) were beyond the powers and jurisdiction of the learned judge and the senior assistant registrar; and

(ii) were not made in accordance with the law and are contrary to and in F conflict with the terms and conditions specified in ss 150(1) and 152 of the Sarawak Land Code ('the Code')

The brief facts of the case as can be garnered from the affidavits may be stated as follows:

On 14 March 1988, the court ordered that the plaintiff's land known as G Lot 1058, Block 5, Miri Concession Land District which was the subject matter of a charge be sold by public auction under the directions of the court pursuant to s 148(2) of the Code. The directions for the sale was given by the senior assistant registrar in the court order dated 9 September 1988 which, inter alia, stated that the reserved price be based on the reserved H price as determined by the Land and Survey Department, which was at RM150,000. However, the public auction held at the said reserved price on 23 June 1990 was unsuccessful as there was no bidder.

By a summons in chambers dated 19 August 1991 the defendant applied for an order under s 152 of the Code that the plaintiff's said land be again put up for auction at a reduced reserved price of RM135,000 based I on a valuation report put up by a private valuer M/s CH William, Talhar, Wong & Yeo Sdn Bhd dated 19 June 1991. On 9 March 1992, Ong J

allowed the application and ordered that the land be again put up for sale with a reduced reserved price of RM135,000 subject to s 151 of the Code and also subject to the directions of the court. On a summons for direction, the learned senior assistant registrar, on 4 March 1993 made the order inter alia, that the auction sale be held on 12 June 1993 with reserved price of RM135,000 and that the proceeds of sale be paid into court and be dealt with in the manner provided in s 151 of the Code. The said two orders were made in the absence of the plaintiff who was duly served with the notice of the proceedings. The second auction was duly carried out and the proceeds of the sale was duly deposited in court. On 2 August 1994, upon application by the defendant, the court made an order, inter alia, that the senior assistant registrar of the High Court, Miri shall execute a registrable memorandum of transfer transferring the said property to the successful bidder. On 27 October 1994 the said property was transferred to the successful bidder by virtue of a memorandum of transfer registered as Instrument No L 854/1994.

This originating motion was heard by Abdul Kadir Sulaiman J on 1 March 1994. At the said hearing counsel for the defendant made a preliminary objection on the following grounds:

(i) whether originating motion was a proper and correct procedure for this court to set aside and discharge the court order granted by Ong J on 9 March 1992 and court order granted by the senior assistant registrar dated 4 March 1993.

(ii) whether a court of co-ordinate jurisdiction has the power to set aside the court order made by Ong J.

On 23 April 1994 the learned judge upheld the preliminary objections of the defendant and accordingly dismissed the plaintiff's application with costs. The plaintiff then appealed to the Supreme Court against the decision of the learned judge. The said appeal was heard by the Supreme Court on 25 September 1995 and in allowing the appeal by the plaintiff the Supreme Court, inter alia, ordered that the case be remitted back to the High Court to be heard on merits before another judge and the purchaser be added as a party to the action. The plaintiff then filed an amended notice of originating motion dated 1 March 1996 and the purchaser was added as a party to this action.

The plaintiff filed two affidavits in support of this application which are the affidavit in support affirmed by Lee Phet Boon (the plaintiff) on 9 November 1993 and the plaintiff's supplementary affidavit affirmed on 22 April 1996. The defendant also filed two affidavit-in-opposition affirmed by Lau Kok Heng @ Liew Kok Heng on 18 January 1994 and on 3 April 1996 respectively. The purchaser also filed his affidavit-in- opposition which was affirmed on 23 March 1996.

The plaintiff submitted that the two impugned orders were not made in accordance with the law in that they failed and/or neglected to comply with the provisions of the terms and conditions stated in ss 150(1) and 152 of the Code and as such the orders are ultra vires and null and void. It was further

submitted by the plaintiff that the reserved price for the property of RM135,000 made by the learned judge and the senior assistant registrar in the said orders are ultra vires as it was not approximately equal to the estimated fair market value of RM169,000 as stated in the valuation report prepared and conducted by M/s CH Williams, Talhar, Wong & Yeo Sdn Bhd dated 19 June 1991 nor was it approximately equal to the fair market value of RM210,000 as stated in the valuation report prepared and conducted by Messrs Hasmi, Samat & Associates Sdn Bhd dated 24 June 1993. In relation to this, the plaintiff also submitted that the learned judge ought to have given reasons for the reduction in the reserved price from RM150,000 to RM135,000. Finally the plaintiff submitted that the learned judge ought to have pronounced and/or to justify why it was advisable that no date or time for sale by public auction be stated in the order to be publicly notified by advertisement.

Whether the impugned orders were made in compliance with ss 150(1) and 152 of the Code

For ease of reference, I reproduce the provisions of ss 150(1) and 152 of the Code, which are as follows:

> 150(1) Where any competent court orders the sale of any land subject to a charge, it shall notify the Superintendent of its decision and shall serve a notice of the intended sale upon the charger and upon the registered proprietor of every other estate or interest in the land. It shall also give notice of the intended sale by advertisement in the Gazette and by such other means as it may deem sufficient. The sale shall be by auction subject to such conditions of sale as shall be approved by the court. The court shall also fix the date of the sale, which shall be not less than thirty days from the date of the order of sale, and shall authorize such other acts as may be necessary for the conduct of the sale. A reserved price shall be put on the land which shall be approximately equal to its estimated fair market value.
>
> 152 When no bid has been made at or above the reserved price, it shall be lawful for the Court to adjourn the sale and to order that the land be again put up for auction with the same or with a reduced reserved price.
>
> Provided that, in every case, it shall be the duty of the court to have the time of the sale publicly notified by advertisement and in such other manner as shall be advisable, or as shall be regulated by any rules made under this Code, or by order of the court.

In the order dated 9 March 1992 the Honourable Denis Ong J ordered the land to be put up for auction at the 'reduced price of RM135,000 subject to directions of the court and s 151 of the Land Code'. The order made by the senior assistant registrar dated 4 March 1993 involved the directions for conduct of sale of the said land.

It was contended by the learned counsel for the plaintiff that the order for sale dated 9 March 1992 is ultra vires as it did not comply with the pre-requisites of s 150(1) of the Code and it was submitted that the most serious of the pre-requisites not complied with was the fixing of the date of sale in the order for sale which must be fixed on a day immediately after or

reasonably after 30 days from the date of the order of sale. It was submitted by the learned counsel for the plaintiff that the date of sale was fixed about 1 year 3 months from the date of the order of sale. In this respect it was also submitted by the learned counsel that the senior assistant registrar had no jurisdiction to make the said order as the court referred to in the Code consist of the judge sitting in the High Court and does not include a senior assistant registrar. It was also submitted that under the Code there can only be one order for sale pursuant to ss 150(1) and 152 does not govern the order of sale. In support of his contention that compliance with the pre-requisites of s 150(1) of the Code is mandatory the learned counsel for the plaintiff cited the following cases:

(1) *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608;

(2) *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422; and

(3) *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805

The learned counsel for the defendant contended that the procedure in s 150(1) of the Code is not applicable or relevant because the said two orders were not made under that section but they were made under s 152 of the Code. In respect of the order made by the senior assistant registrar the learned counsel submitted that the senior assistant registrar had the power and the jurisdiction by virtue of O 32 r 9 and O 31 r 2(4) of the Rules of the High Court 1980 to do so.

The learned counsel for the purchaser agreed with the defendant that the said two orders were not ultra vires and submitted further that there is no requirement that when the court makes an order for sale of charged land it must also make directions for its conduct. According to the learned counsel the directions for conduct of sale are not pre-requisite but merely consequential to the making of the order for sale and therefore the directions for sale may be made separately in a subsequent order.

In *Maimunah bte Megat Montak v Mayban Finance Bhd* the Supreme Court held that the provisions of s 257(1)(a) to (d) were mandatory. In that case it was held that the order for sale was invalid as it did not fix the auction date nor did it stipulate the amount actually due under the charge. It is to be noted that the order for sale in *Maimunah*'s case was in relation to the first auction unlike in the present case where the impugned order for sale was in relation to the second auction made under s 152, ie the land be again put up for auction after the first auction was unsuccessful. It is also to be noted that in *Maimunah*'s case the facts did not show whether the chargee had applied for and obtained the directions for sale in relation to the said order for sale before the appeal was made by the chargor against the order for sale. In the present case the chargee had applied for and obtained the directions for sale which was granted by the senior assistant registrar and in fact the sale of the land had been carried out pursuant to the two impugned orders and the land had been transferred to the purchaser. The plaintiff made this application after the transfer had been completed.

It is also to be observed that the provisions of s 257(1) of the National Land Code and s 150(1) of the Sarawak Land Code are not similarly worded. It is my view that unlike the order for sale made under s 257(1) of the National Land Code which must include the requirements in para (a) to (d) thereof the order for sale made under s 150(1) of the Sarawak Land Code may be made without incorporating the directions for the conduct of sale at the same time. In other words the directions for conduct of sale are not pre-requisites but merely consequential to the making of the order for sale and as such the directions for sale may be made separately in a subsequent order.

Alternatively I hold that, as the order for sale was made pursuant to the application under s 150 of the Code the said order which provided that the land be put up for auction at the 'reduced price of RM135,000 subject to the directions of the court and s 151 of the Land Code' was valid as it complied with the provisions of s 152 of the Code. As the requirements under s 150(1) are separate and distinct requirements from the provision of s 152 of the Code but they have also to be complied with before the auction can be carried out the directions for sale pursuant to s 150(1) of the Code are therefore consequential to the order made under s 152 of the Code and they may be made in a separate application. Furthermore, the order for sale dated 9 March 1992 clearly provided that it is 'subject to the directions of the court'.

As regards the plaintiff's contention that the learned senior assistant registrar had no power and jurisdiction to make the order dated the 4 March 1993 I hold that the senior assistant registrar had the power to do so as the word 'court' under s 150(1) of the Code includes the senior assistant registrar sitting along by virtue of O 32 r 9, O 31 r 2(4) and O 1 r 4(2) of the Rules of the High Court 1980.

Under O 32 r 9 of the Rules of High Court 1980, the senior assistant registrar has the power to transact all such business and exercise all such authority and jurisdiction transacted and exercised by judge in chambers except matter which the Chief Justice may direct or under the rules may only be transacted by a judge. In the *Malaysian High Court Practice* (1998 Desk Edition) at p 2258 it was stated by the learned author that:

> Unlike the old rule, this rule is phrased so as to equate the jurisdiction of the registrar to that of the judge in chambers in matters which under the Courts of Judicature Act 1964 (Act 91) or under the rules may be transacted by a judge in chamber, except matters which the Chief Judge may direct or under the rule may only be transacted by a judge. Therefore the registrar cannot deal with what a judge can hear and deal with it in open court, unless otherwise directed by the Chief Judge: *Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor* [1995] 1 MLJ 92'.

I am unable to agree with the submission made by the learned counsel for the plaintiff that O 32 r 9 refers only to the 'registrar' and does not include 'the senior assistant registrar'. In s 2 of the Courts of Judicature Act 1964 the word 'registrar' has been defined as 'the Chief registrar and any registrar, Deputy registrar, senior assistant registrar or assistant registrar appointed under s 10'. As such the powers and authorities given to the

registrar under the Rules of the High Court can also be exercised by the senior assistant registrar.

Under O 31 r 2(4) of the Rules of High Court 1980 it is provided that on the hearing of the summons the court may give such directions as it thinks fit for the purpose of effecting the sale and by virtue of O 1 r 4(2) the word 'Court' includes the registrar (see *Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15). It is to be observed that the powers given to the court to give directions for the purpose of effecting the sale is very wide and it is not only confined to the directions as stated in para (a) to (h) of O 31 r 2(4). Hence the submission made by the plaintiff that the directions to be given under the said r 2(4) do not include the fixing of the date of sale by auction is untenable.

It is also my view that the two cases cited by the learned counsel for the plaintiff ie *Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor & Other Actions* [1995] 1 MLJ 92 and *Development and Commercial Bank, Johor Bahru v Kim Ming Choon* [1991] 2 MLJ 246 can be distinguished from the present case. In *Chan Sang*'s case the application was made under O 52 r 2(1) of the Rules of the High Court which has to be made to a judge in open court and accordingly Abdul Malek Ahmad J ruled that the word 'Court' in the context of O 52 r 2(2) does not include the registrar. In *Kim Ming Choon*'s case the issue was whether the senior assistant registrar could vary the order for sale issued by the learned judge and the court held that the senior assistant registrar had no power to do so. In the present case the order made by the senior assistant registrar on 4 March 1993 did not vary the order made by the judge on 9 March 1992. The senior assistant registrar merely made consequential orders relating to the directions for the conduct of sale to complement the order for sale made by the learned judge.

As stated in para 9 of the defendant's affidavit in opposition affirmed by Lau Kok Heng @ Liew Kok Heng on 3 April 1996 and the exhibits produced thereto the directions given by the senior assistant registrar on 4 March 1992 had been duly complied with. The plaintiff did not dispute that and as such he is deemed to admit that the directions were duly complied with.

Whether the reduced reserved price of RM135,000 was a fair market value

The original reserved price was RM150,000 and the reserved price was reduced to RM135,000 by the order for sale made on 9 March 1992 in accordance with s 152 of the Code which provided that the land be again put up for auction with the same or with a reduced reserved price. It was stated by the plaintiff in para 9 of his affidavit affirmed on 9 November 1993 that the reserved price of RM135,000 was not approximately equal to the estimated fair market value of RM169,000 as stated in the valuation report prepared and conducted by Messrs CH Williams, Talhar, Wong, Yeo Sdn Bhd (LPB-3) nor was it approximately equal to the fair market value of RM210,000 as stated in the valuation report prepared by M/s Hasmi, Samat & Associates Sdn Bhd (LPB-4). It was submitted by the learned

counsel for the plaintiff that when the sale took place on 12 June 1993 the valuation relied upon on 19 August 1991 (the date the summons in chambers was filed) was no longer a valid valuation in which to base the fair market value resulting in unfairness and prejudice to the plaintiff. A

The defendant stated in para 6 of the affidavit which was affirmed on 3 April 1996 that the reserved price was based on a valuation carried out by M/s CH Williams Talhar, Wong & Yeo Sdn Bhd dated 19 June 1991 (LPB-3) which was filed in support of the application. In para 8 of the said affidavit the defendant stated that the court orders dated 9 March 1992 and 4 March 1993 were all properly served on the plaintiff but he did not appear at the hearing thereof. B

There is no doubt that the learned judge had relied and accepted the valuation report prepared by M/s CH Williams, Talhar, Wong, Yeo Sdn Bhd (LPB-3) which stated that the recommended reserved price was RM135,000. The plaintiff did not challenge or oppose the recommended reserved price and in fact he chose not to attend the hearing. That was the only evidence available to the learned judge at that time. As such the learned judge was acting within his jurisdiction in fixing the said reserved price. C D

I am also of the view that the reserved price determined under s 152 of the Code may not be approximately equal to its estimated fair market value unlike the reserved price determined under s 150(1) of the Code. Section 152 permits the court to fix a reduced reserved price. As such even if the reserved price of RM135,000 was not approximately equal to the estimated fair market value of the said land the learned judge had also acted within the provision of s 152 of the Code. E

I also hold that there is no substance in the plaintiff's contention that the sale which took place on 12 June 1993 resulted in unfairness and prejudice to the plaintiff as it was based upon the valuation made on 19 August 1991. The price of RM135,000 was the minimum price the said land could be sold at the auction. It was then left to the bidders to push the price up. In this connection the Supreme Court has made the following observation in *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1992] 2 MLJ 349 at p 353: F

> ... Parliament, in legislating this provision, must have been aware of the futility of increasing the reserved price above that the latest auction at which there was no bidder. At an auction sale the bid must start at or above the reserved price. It is logical, therefore that the reserved price at the subsequent auction should either be at the same reserved price as the last unsuccessful auction, or at a reduced reserved price. It may be true that when the next auction date is fixed after a long lapse of time, the market value of the land may have increased to beyond the reserved price fixed at the last auction. If that is so, the law requires that the reserved price fixed for the next auction cannot be above the reserved price fixed for the last auction. It is then left to the bidders to push the price up when they make their bids. G H

As to the plaintiff's contention that the learned judge ought to have given reasons for the reduction of the reserved price it is my view that in the circumstances of this case the learned judge was not required to give his reasons for the reduction of the reserved price. The learned judge relied I

upon and accepted the recommended reserved price made by M/s CH Williams, Talhar, Wong, & Yeo Sdn Bhd which was the only evidence available at that time and the plaintiff chose not to oppose the application. Furthermore s 152 of the Code does not require any reasons to be stated when granting the application and the plaintiff did not appeal against the decision made by the learned judge.

I also hold that there is no merit in the plaintiff's contention that the learned judge should have stated in his order as to why it was advisable that no date or time for public auction be stated in the order as I have already decided earlier that the directions for sale pursuant to s 150(1) of the Code are consequential to the order made under s 152 of the Code and they may be made in a separate application.

The reliefs sought involved an exercise of discretion

As an alternative the plaintiff is seeking for a declaration that the two impugned orders are ultra vires and null and void. It was submitted by the learned counsel for the purchaser that the plaintiff is not entitled to obtain the declaratory relief because the plaintiff failed to exhaust available remedies and the plaintiff is guilty of unexplained delay in bringing these proceedings.

In *Hordern Richmond Ltd v Duncan* [1947] 1 All ER 427, Cassels J made the following observation at p 430:

> My intention has been drawn to several cases in which declarations have been applied for and in some instances granted and in others refused, but I cannot help thinking that the granting of a declaration, which is part of the equity jurisdiction, is very much a matter for the discretion of the court in the circumstances of the case before it.

In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651, Gopal Sri Ram JCA had this to say at p 661:

> ... the remedy of declaration may be refused upon settled principle. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v A-G of Hong Kong & Anor* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v Lye Thai Sang & Anor* [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Horner* (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik & Anor v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety if circumstances in which declaratory relief may be denied in the exercise of discretion.

There were adequate alternative remedies available to the plaintiff in respect of the two orders made against him. In respect of the order dated

the 9 March 1992 by the learned judge the plaintiff had the right to apply for further argument in open court within 4 days from the date of the order as provided under O 56 r 2 of the Rules of the High Court 1980. The judge had the power to certify that he required no further argument and in such event the plaintiff had the right to appeal to the Supreme Court. If the judge heard further arguments, he was empowered to set aside and make such other order as he thinks just. As regards the court order dated 4 March 1993 by the senior assistant registrar, the plaintiff had the right to appeal to the judge in chambers in accordance with O 56 r 1(1) of the Rules of the High Court 1980.

I also agree with the submission made by the learned counsel for the purchaser that not only the plaintiff allowed the two orders to be entered by his own default or apathy, but, he is also guilty of unexplained delay in bringing these proceedings. In addition the purchaser had acquired title to the land upon registration and as such the purchaser is entitled to the statutory protection of s 153 of the Code. Under such circumstances I am of the view that this is not a proper case for the court to grant a declaration applied for by the plaintiff in the event it was decided that the two impugned orders were not made in accordance with ss 150(1) and 152 of the Code.

For the reasons given above, I dismiss the plaintiff's action with costs to be taxed unless agreed upon.

Application dismissed.

Reported by Jafisah Jaafar